

FTC Noncompete Ban Could Split Health Industry, Raise Costs

By **Peter Glennon** (February 24, 2023)

Few industries will be affected as much as health care if the Biden administration's proposed nationwide ban on noncompete agreements goes into effect next year.

The dramatic proposed rule from the Federal Trade Commission could upend long-established practices from medical clinics, hospitals and private practices around the country, if it survives in its current form.

It would effectively create two systems of hiring practices, giving nonprofits more power to restrict employees than for-profits, with potentially far-reaching consequences.

Employers in health care and other industries should begin thinking about how they may respond to those changes, but they'll also want to keep track of legal and administrative challenges to the ban, which have decent odds of success.

Generally speaking, noncompete agreements are contracts that workers sign with their employers which limit their ability to take a job at a direct competitor. They aren't absolute: Workers can typically leave for a job in a different city or state or in another field.

These agreements are handled under state, not federal law, and the laws vary from quite permissive to total bans. Individual judges can also rewrite or throw out noncompetes that they think are too restrictive.

President Joe Biden campaigned on a pledge to ban noncompete agreements, and he highlighted the FTC proposal — perhaps prematurely — as one of his signature accomplishments in his recent State of the Union address.

As he has done before, Biden characterized the ban as preventing a contract that would stop the cashier at a burger place from going across town to get a job.[1] Fact-checkers have noted that this is an inaccurate example, since fast food chains rarely use noncompetes.[2]

At other times, Biden has also used the example of a construction worker — another job in which noncompetes are rare.

They are more common in highly specialized fields such as medicine, where a doctor, dentist or nurse practitioner with a particular unique skill set, a base of clients and a professional reputation could undermine a business by resigning and setting up a competing practice across the street.

The president is not wrong when he says that noncompete agreements have been abused at times. The FTC pointed to their misuses among phlebotomists, which is fair. As an employment lawyer who has represented both professionals and employers, I've seen or read about many abuses, including situations where an agreement meant for highly skilled workers was instead used to attempt stop a security guard from taking another job.

But in those situations, the law is clear in most jurisdictions that the noncompete agreement



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would be invalid and not enforced. Employees who are being unfairly prevented from taking another job can go to court and ask the judge to limit the scope of a noncompete agreement or even throw it out entirely if it's poorly written or overly broad. Thus, it might be better for a focus on limiting the abuse and misuse of noncompete agreements by unscrupulous employers.

States have also stepped in to set their own rules, helping curb bad practices.

There are legal questions about whether the Federal Trade Commission even has the authority to ban noncompetes. The U.S. Chamber of Commerce has threatened to sue to stop the rule from going into effect, and I have a lot of company among my peers in thinking their case has merit.

The FTC, which has never waded into this area of law in its nearly 50-year existence, built its case on the idea that noncompete agreements hurt consumers.

It's not clear that is true for the health care industry, however.

Highly skilled doctors build their reputation through their association with a practice or hospital and its marketing efforts. Employers may also invest in training for higher-end specialists like heart surgeons. But even with such investments, not all doctors will be beholden to a noncompete agreement. For example, it is arguably hard for an employer to enforce a noncompete agreement against an anesthesiologist, unless they can articulate a legitimate business interest to do so.

Employers use noncompete agreements to protect their interests in these situations, but they may also be protecting the consumer.

In the absence of noncompete agreements, these specialists would essentially be free agents, moving around to the highest bidder and raising health care costs for everybody. Employers would be less interested in paying for training a worker who might leave at any time. And hospitals might face more worker shortages for crucial positions in high demand, raising costs even more.

Even if the FTC ban goes into effect, it has long been established law that the agency has no authority over most nonprofits, which includes many hospitals and some health care systems. This could create a two-tiered system, with employers facing different rules based on how they are structured that could have long-term effects on the industry.

That could lead to more legal challenges as well, especially if the Biden administration continues to be aggressive in this area.

In the late 1990s, the U.S. Supreme Court unanimously ruled that a nonprofit dental trade association was governed by the FTC because it operated by marketing and providing benefits to its members, which were all dental practices.

Under that precedent, I would expect a number of legal challenges to sort out whether a certain nonprofit health care employer was a true nonprofit that could enforce a noncompete.

In my experience, most doctors, dentists and other health care employees prefer not having noncompete agreements. But most of them also recognize the practical trade-offs and don't mind them as long as the employer doesn't misuse them and is reasonable when faced with

a difficult personal situation.

The FTC's proposed total ban would upend the table for health care industry, wipe away any investments or bonuses already paid to employees by employers and leave two separate worlds in which health care professionals would have to operate: one for profit without noncompete agreements and one nonprofit with noncompete agreements.

In any event, it could create higher costs for consumers of health care services.

Peter Glennon is founder of The Glennon Law Firm and author of "Am I Stuck In This Practice?: A Guide On Non-Compete Agreements For Doctors, Nurses, Dentists, And Other Health Care Providers."

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[1] <https://www.rev.com/blog/transcripts/president-bidens-state-of-the-union-address-transcript>.

[2] <https://www.factcheck.org/2020/07/bidens-false-claim-about-mcdonalds/>.